is charging on the basis of 55 cents per square foot under regulation 10A(1) which reads:

"10A(1). Notwithstanding the provisions of regulations 7 and 10 if the local authority has served notice upon the occupier in pursuance of regulation 8 or 10 the owner shall pay to the local authority in addition to the cost and expenses payable under regulation 7 or 10 a sum of money as the local authority may in its absolute direction decide calculated at the rate of not less than 5 cents and not more than 200 cents per square foot of the whole area of the land but in any event the sum payable shall not be less than one thousand dollars and not more than three times the amount of the annual value of the holding.

(2) The decision of the local authority under paragraph (1) shall be final and shall not be questioned in any courts."

Before the amendment compensation was levied at the local authority's discretion according to the number of squatter families removed [see regulation 7(a) sub-para (v) and regulation 10(2)]. Regulation 7(a) sub-para (v) has been deleted by the 1970 amendment and the basis of levying compensation is substituted with that of regulation 10A. Since the value of the land has appreciated four-fold from $2,000,000.00 before demolition to $8,000,000.00 after demolition, the rate of 55 cents per square foot is in my view fair and equitable. Had it been levied on the old basis, it would have been quite a substantial sum in view of the fact many families were removed.

I now come to the question of procedure. The respondents contend that the action should have proceeded by way of writ and not originating summons because disputed questions of fact and law are involved. When a question of fact is at issue action is to be by way of writ and not by originating summons. This is because the facts have to be established by examination and cross-examination of witnesses. In the present case the disputed question of fact would be as to the number of squatter families removed from the said land. The question now is whether the number of squatter families is a relevant question rendering it necessary to be established by examination of witnesses in court. The determination of number of squatter families would be crucial under the unamended 1969 Regulations because the mode of computing compensation under regulation 7(a)(v) is by squatter families. But with the amendment the method of computing is by way of area.

I have said earlier that the amendment applies retrospectively and so the basis of levying compensation is by area and not squatter families removed. As such the question of how many squatter families are removed is not relevant and therefore not a fact crucial to the determination of the case. Therefore the procedure adopted by the applicants is in order.

The counterclaim by the respondents has been withdrawn and I will not express any view on it.

I therefore order that the holding be attached and sold pursuant to section 50 of the Town Boards Enactment (Cap. 137) to recover the sum of $338,378.45 as costs and compensation for removal of squatters together with interest at 6% per annum from 9th June 1970 until payment and costs of this application.

Claim allowed.

Solicitors: *Shook Lin & Bok; Shearn Delamore & Co.*

PUBLIC FINANCE BHD. v. NARAYANASAMY

[F.C. (Ong C.J. (Malaya), Gill & Ali F.JJ.) April 27, 1971]

[Kuala Lumpur — Federal Court Civil Appeal No. 123 of 1970]

Land Laws — Indefeasible title —Fraud — National Land Code, s. 340.

The respondent had purchased a large piece of land with the view to reselling subdivided portions thereof. The respondent executed a charge over 187 acres of the land to secure the repayment of $440,000 to the appellants. The appellants knew as a fact that the charged land had been fragmented and over 100 acres thereof resold to sub-purchasers who had gone into possession of their respective areas upon part-payment of approximately 4/7 of the purchase price. The appellants subsequently applied to court for an order for sale of the whole of the 187 acres charged to them to recover the principal and interest due to them. Three of the sub-purchasers applied to be added as respondents. The object of these sub-purchasers was to claim ownership of 45 acres in all and to have the same excluded from any ordes of sale made by the court. The appellants opposed the intervention of the sub-purchasers and contended that they need pay no regard whatsoever to the rights of the sub-purchasers. The learned trial judge found that the appellants were guilty of fraud and collusion and dismissed the application of the appellants. On appeal,

Held, dismissing the appeal: the appellants' insistence that the interveners had no rights whatsoever, except a right to damages against the respondent for breach of contract, was so plainly unconscionable that the learned judge was justified in holding that they were guilty of fraud and collusion.

FEDERAL COURT.

Henry Cheah (*E. K. Yeap* with him) for the appellants.

Tan Sun Cheong for the respondent.

M. Sivalingam for the first and second interveners.

S. Jayabalan for the third intervener.

Ong C.J. (Malaya) (delivering the judgment of the court): The chargor, respondent in this case, was the fragmentor of an estate, who had purchased a large piece of land with the view to reselling subdivided portions thereof at a considerably higher price than he had paid for it per acre. This has been a common practice of speculators in Malaya for more than ten years past of which financiers like the appellants must undoubtedly have been well aware.

On December 31, 1968 the respondent executed a charge over approximately 187 acres of land held under Certificate of Title No. 20924 to secure the repayment of $440,000 to the chargees, the appellants herein. The appellants knew as a fact that the charged land had been fragmented and over 100 acres thereof resold to sub-purchasers who had gone into possession of their respective areas upon part payment of approximately 4/7 of the purchase price. As regards the balance due

from these sub-purchasers, the appellants for their own protection had required a written undertaking from the chargor that, upon receipt of such moneys, the same would be paid immediately into the clients' account of the chargor's solicitor with the Public Bank, Ipoh, and advice of such payments given to the appellants. The respondent countersigned the undertaking so given in a letter by his solicitor dated December 30, 1968. This undertaking was doubtless a condition precedent to the execution of the charge on the following day.

Attached to the letter of undertaking was a schedule listing the names of sub-purchasers, the acreage and purchase price of the parcels severally bought by them and the balance remaining due from them respectively. This schedule showed that the total sales should realise $703,870, of which only $294,216.68 remained outstanding. Hence it was clear that approximately $409,000 had gone to the respondent. Whether he paid the whole or part thereof to the company from whom he purchased the land, or pocketed the moneys himself, is not ascertainable from the affidavits. We were told by counsel for the appellants that the loan was given to enable the respondent to complete his own purchase and that, had the appellants not come to the respondent's rescue, not only the respondent but the sub-purchasers might have lost the moneys they had already parted with. That may very well be true. But it is equally true that the loan was not given from altruistic motives with the remotest intention of benefiting the sub-purchasers. As counsel admitted, what the appellants sought to gain from the transaction was nothing more than to earn interest. "How" he asked, "were they to foresee that the sub-purchasers would not pay up the balance of purchase price as agreed with the chargor?" We think it ought to have been within the contemplation of the appellants that, in the normal course, the sub-purchasers might reasonably be expected to complete — whereas the respondent himself, even after receipt of the $295,000 coming from them, might still be unable to discharge the charge. In fact this contingency was anticipated, as counsel admitted, because the loan of $440,000 was given on the basis of the security being worth about $795,000 comprising the value of 78 acres, in 13 lots, remaining undisposed of, added to the balance of $295,000 due from the sub-purchasers. Both the chargor and chargees, therefore, had anticipated completion by the sub-purchasers. In that event, should the respondent, nevertheless, be unable or unwilling to repay the debt, can the appellants in all good conscience apply to the court for an order of sale to include property over which the respondent, to their knowledge, has no power of disposal? What the respondent himself cannot lawfully do the court cannot authorise to be done, if the result would be to condone or enable a fraud on third parties. Section 340 of the National Land Code clearly states that the title of any registered proprietor of land shall not be indefeasible in the case of fraud to which he was a party. At the time the charge herein was executed, the respondent was bound by contract to sell and give a good title to any sub-purchaser who had carried out his part of the contract. This obligation was a fact known to the appellants. They, nevertheless, by virtue of the charge, agreed with the respondent to ride roughshod over all the sub-purchasers, should the need arise to enforce the security. This conclusion is indisputable from the admitted facts. It was on these facts that the learned judge found fraud and collusion and in our opinion he was abundantly justified in his finding. He made this finding upon an application by 3 sub-purchasers to intervene and be joined as respondents, which the appellants strongly resisted.

On October 22, 1969 the appellants applied to court for an order of sale over the whole of the 187 acres charged to them to recover a sum of $365,112.96 being the principal and interest due as on October 13, 1969 and further interest accruing thereafter. Before any order was made Lim Thye Peng and Ong Tay Phang, two of the sub-purchasers, applied by summons in chambers dated July 18, 1970 to be added as respondents. They had paid $144,250 in full for their 25 acres comprised in 5 lots. A third sub-purchaser, Yik Fook Hing, made a similar application 2 weeks later. He, too, had paid $163,000 for 20 acres and little or nothing remains owing to the respondent for the balance of the purchase price by reason of certain compensation due to him from the respondent.

It is crystal clear that the object of these three sub-purchasers was to claim ownership of 45 acres in all and to have the same excluded from any order of sale made by the court. We have no doubt whatever in our minds that they are entitled to a decree of specific performance against the respondent. They had fulfilled their part of the contract and nothing remains but for the respondent to execute transfers to them when separate titles are issued.

We understood that the appellants had appealed mainly in order to remove the reflection cast on their reputation by the judge's finding of fraud. The remedy, which they and their legal advisers completely overlooked, lies entirely in their own hands. They had chosen to oppose the intervention by the sub-purchasers. They claimed their full pound of flesh, as registered chargees, and contended that they need pay no regard whatsoever to the rights of sub-purchasers. It was argued that, had any of them paid up in full at the time of execution of the charge, their case might have been unanswerable. The simple answer is that the appellants were aware of their incohate rights against the respondent and that completion by them in due course may be fully expected by reason of the substantial sums already paid. What matters is that at the time the appellants applied for an order of sale the three sub-purchasers were beneficial owners of their 45 acres. By their intervention they merely asked that their legal rights should be recognised. And, be it noted, their application was not opposed by the respondent.

The appellants' insistence that the interveners had no rights whatsoever — except a right to damages against the respondent for breach of contract — is so plainly unconscionable that we are not at all surprised that the judge was driven to find fraud and collusion. We would have done the same. Had they conceded that the sub-purchasers were entitled to the lands they

had paid for, it would have been impossible for any court to say that they intended to perpetrate a fraud. But by their own choice, they had affixed the label on themselves. They cannot claim the same protection as purchasers for value without notice. In our opinion the grounds of appeal were frivolous and entirely without merit.

We accordingly dismissed the appeal with costs.

Appeal dismissed.

Solicitors: *Yeap & Yeap; Ngan & Tan; Lim Cheng Ean & Co.; Maxwell, Kenion, Cowdy & Jones.*

NEW INDIA ASSURANCE CO. LTD. v. PANG PIANG CHONG & ANOR.

[O.C.J. (Syed Othman J.) April 25, 1971]

[Johore Bahru — Civil Suit No. 10 of 1964]

Insurance — Motor insurance — Proposal — Statement that insured had not been convicted of offence "in connection with the driving of a motor vehicle" — Convictions for driving in contravention of statutory offences not related to act of driving — Whether statement did constitute a non-disclosure of a material fact or representation of fact which was false in some material particular — Whether insured who committed statutory offences a bad risk — Road Traffic Ordinance, 1958, s. 80 (3) & (5).

On a proposal by the first defendant, the plaintiffs insured his station wagon and himself against the usual third party risks for the period from July 17 to November 23, 1962. On October 8, 1962 the vehicle was involved in an accident in which one Abdon was killed. The insurers sought a declaration that they were entitled to avoid the insurance on the ground that "apart from any provision contained in the policy, the policy was obtained by non-disclosure of material facts and/or representation of a fact which was false in some material particular." One of the questions contained in the proposal was: "4. Have you or any person who to your knowledge will drive, been convicted during the past 5 years of any offence in connection with driving any motor vehicle?" The answer given was "No." The insurers said that the representation of fact contained in the answer was false in particulars which it was material to be known to them in or about the said policy, namely, that in truth and in fact the first defendant himself had been convicted during the past 5 years of offences in connection with the driving of motor vehicles. They also said that the first defendant by the answer failed to disclose facts material to be known to them in or about the making of the said policy. There was evidence that he had been convicted in the magistrate's court at Johore Bahru of five offences in all under the Road Traffic Ordinance on March 8, 1960 and on March 14, 1961.

The defence *inter alia* contended that assuming evidence concerning the proposal could be accepted, the offences which the first defendant had committed could not be said to be connected with the actual driving of a motor vehicle. The evidence showed that the offences the first defendant was convicted were statutory offences which did not relate to his act of driving.

The main question to be determined was whether the answer to question 4 in the proposal entitled the insurers to avoid the insurance in view of the conviction of the first defendant of the five offences.

Held, dismissing the application: (1) the statutory offences of which the first defendant was convicted in this case did not show that he was iresponsible for the purposes of an insurance cover and therefore he was not a bad risk;

(2) the first defendant's answer to the question did not constitute a non-disclosure of a material fact or representation of a fact which was false in some material particular.

Cases referred to:-

(1) *Revell* v. *London General Insurance Co. Ltd.* [1934] All E.R. Rep. 744.

(2) *Taylor* v. *Eagle Star* (1940) 67 Ll. L.R. 136.

(3) *Corcos* v. *De Rougemont* (1925) 23 Ll. L.R. 34.

APPLICATION.

T. G. Dunbar for the plaintiffs.

Peter Williams (*Tennakoon* with him) for the second defendant.

Syed Othman J.: On 17th July, 1962, on a proposal by the first defendant, the plaintiffs who are insurers, insured the first defendant's station wagon and the first defendant against the usual third party risks for the period from 17th July, 1962 to 23rd November, 1962. On 8th October, 1962, during the currency of the insurance, one Cheong Moi while driving the vehicle on the first defendant's order or with his permission was involved in an accident in which one Abdon bin Haji Dahalan was killed. On 20th October, 1963 the dependants of the deceased issued a writ in the High Court at Johore Bahru claiming damages against Cheong Moi for negligence. The policy covers such liability.

The insurers now seek a declaration that they are entitled to avoid the insurance on the ground "apart from any provision contained in the policy, the policy was obtained by non-disclosure of material facts and/or representation of a fact which was false in some material particular." One of the questions contained in the proposal is "4. Have you or any person who to your knowledge will drive, been convicted during the past five years of any offence in connection with the driving of any motor vehicle?". The answer given is "No".

The insurers say that the representation of fact contained in the answer was false in particulars which it was material to be known to them in or about the said policy, namely, that in truth and in fact the first defendant himself had been convicted during the past five years of offences in connection with the driving of motor vehicles.

They also say that the first defendant by the answer failed to disclose facts material to be known to them in or about the making of the said policy. He was convicted in the Magistrate's Court at Johore Bahru of five offences in all under the Road Traffic Ordinance, 1958, on 8th March, 1960 and 14th March, 1961.

The first defendant did not enter appearance to the writ of summons. On 28th December, 1967, leave was granted to the insurers to set down a notice for judgment. A notice of motion filed early in 1968 was fixed for hearing on 29th February, 1968 but the motion was withdrawn. On 4th July, 1968, an amended statement of claim was filed joining the second defendant